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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-983

DAVID M. LIGHTMAN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported in 15 Md. App. 713 (1972). The Court of Appeals of Maryland granted a writ of certiorari to the Court of Special Appeals and affirmed. 266 Md. 550 (1972). These opinions are set forth in the Appendix to the Petition.

JURISDICTION

Petitioner asserts this Court's jurisdiction under 28 U.S.C. §1257(3).

QUESTION PRESENTED

When State law protects a newsman's sources but State courts have held that questions directed to Petitioner involved his personal observations revealing criminal activity and not his sources, does the First Amendment grant Petitioner (who never identified himself to those about whom he wrote as a newsman) special status to refuse to answer questions before the Grand Jury by claiming the police could have discovered the information by other means?

STATUTES INVOLVED

Article 35, Section 2 of the Annotated Code of Maryland (1971 Replacement Volume) makes privileged the source of a newsman's information. It provides in pertinent part:

> "No person engaged in, connected with or employed on a newspaper . . . shall be compelled to disclose, in any legal proceeding or trial . . . the *source of any news or information* procured or obtained by him for and published in the newspaper . . on and in which he is engaged, connected with or employed." (Emphasis supplied.)

Petitioner asserts infringement upon his rights under the First Amendment to the United States Constitution.

STATEMENT

In July, 1971, Petitioner, a newspaper reporter on assignment by the Baltimore Evening Sun to look into the drug situation in Ocean City, Maryland, visited a pipe shop in Ocean City (T. 31-32, 49-50;* Stip. ¶¶7(2), 7(4), 7(6), 7(7) and 7(8)). In the course of this assignment sometimes he revealed his identity and sometimes he did not (T. 55).

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* "T" refers to Transcript, September 24, 1971. The Summons of Petitioner has been renewed periodically before successive Grand Jury terms with agreement of counsel that the facts and issues remain the same.

During a visit to the pipe shop Petitioner, in the guise of a prospective customer, observed and participated in the following occurrence as he later reported in his article, "Ocean City: Where The Drugs Are?":

> "The shopkeeper, her legs stretched out on a waterbed in the next room, tried to explain uses of the various pipes to a customer.
>
> "The shopkeeper asked him if he would like to 'draw some grass.' He pointed to the officer.
>
> "Declines Offer
>
> " 'Don't worry about him. We have a lot of cops come in. You know, it's rough for them, most are under 21. We're nice to 'em, so they don't come sniffing around.' The customer declined the offer."
>
> * * * * * *
>
> "The woman in the pipe store for example is 22. 'I don't think grass will hurt you, so I sell this head stuff. And I smoke cigarettes because I figure they hurt you until you're older.
>
> " 'But these other drugs just aren't worth it. After you've turned on to acid or coke a few times, you realize how temporary it is.'
>
> "She says she does not use any drugs herself". (SX-1).

Petitioner was the customer referred to in this excerpt and was the person to whom the statements of the shopkeeper were made (T. 86; Stip. ¶7(9)). There was no testimony that Petitioner identified himself to the shopkeeper as a newspaper reporter or that she gave him any information based upon any such representation (T. 76-77). Apparently, Petitioner was in the Pipe shop solely as a result of his pattern of going in and out of shops, casually talking to people, and mingling with them (T. 79, 50-51). Petitioner also testified that he wrote an article entitled "New Religions

Appear on the Boardwalk" as to which the shopkeeper was of assistance, but nothing in that article suggested any criminal conduct (T. 52, 56, 77; RX-1), and that article was not the subject of any questions by the Grand Jury (Stip. ¶7).

The questions which the State courts held Petitioner must answer were based solely on his personal observations, namely, to describe the shopkeeper and to give the location of the pipe shop (Stip. ¶¶7(8) and 7(11); T. 74-80; Petit., Apx. 23). Petitioner was not asked to reveal the confidential source of any information obtained by him.

The Chief of the Ocean City Police Department testified that there was no possible way for him to determine the location of the pipe shop without obtaining information from a person visiting it, and his lieutenant had been unable to locate it or any other information pertaining to the newspaper article after the Chief had directed him to investigate (T. 10, 13, 15, 19). See also testimony of the State's Attorney that there was no way he could tell the location of the shop from information submitted to him by government officials (T. 61). The trial court accepted this testimony as a matter of fact (T. 28-29).

Petitioner has based his Petition in part upon a factual conclusion contrary to that of the trial court, namely, that there was no reasonably thorough police investigation and that such an investigation would have disclosed the information. Petition, pp. 3, 4, 8. The testimony cited by Petitioner to support his conclusion does not go that far. The Chief of Police testified that he gave his Lieutenant instructions to attempt to identify the number and location of any shops meeting the description in the article, and the Lieutenant came up with negative results. The Chief further stated only that he made no such investigation himself, that he did not specifically ask his Lieutenant to determine how

many shops in Ocean City fit the description, and that his Lieutenant never gave him any indication that he had sought to ascertain how many (T. 15-16). This testimony does not establish that no reasonable investigation was conducted, and does not contradict the trial court's finding, particularly in light of the Chief's testimony that he did direct his Lieutenant to conduct a full investigation (T. 19).

Petitioner also refers to alleged evidence of harassment as the alternative factual basis for his Petition, but the testimony cited fails completely to support such an inference (Petition, pp. 3-4, 8). The complete response of the State's Attorney to defense counsel's question whether he recalled telling defense counsel that he knew the identity of the shop was: "I might have told you that, but I didn't" (E. 61-62). This was the only testimony on this point. Likewise, the acknowledgment (in response to defense counsel's questions) by the State's Attorney, a former State Senator often mentioned in the newspapers, that in his opinion, upon occasion, the Sun papers had wrongly created inferences by innuendo (T. 58-60), and his questioning of the Evening Sun's managing editor about the paper's concern about narcotics enforcement and whether the paper ever complimented Ocean City law enforcement (T. 37-40), simply do not provide a basis for claiming harassment of Petitioner, as a reporter or otherwise.

The State's Attorney explained that he summoned Petitioner to testify after being requested orally and in writing by the Mayor of Ocean City to investigate the observations described in Petitioner's article (SX-2; T. 60-61). He had no other access to the information (T. 10, 19, 61). Acting on such a legitimate request by another governmental official in this single instance certainly does not indicate harassment of Petitioner by the State's Attorney.

ARGUMENT

THERE IS NO IMPORTANT CONSTITUTIONAL QUESTION.

This case is simply not a case which involves disclosure of a newsman's sources. Maryland law protects a newsman's sources. Anno. Code of Md., Art. 35, §2. However, in this case the Maryland courts have carefully considered the facts and have held that the information sought in this case did *not* constitute ". . . the 'source' of the news or information published by the [Petitioner]." Petit., App. pp. 12, 23.

Petitioner has attempted to convey the impression in posing the Question Presented and in stating his Reason for Granting the Writ that Respondent was seeking disclosure of Petitioner's sources of published news, but this is not correct. Respondent is seeking only Petitioner's own personal observations, which revealed illegal activity but were not made in confidence. Rather, they were made by Petitioner posing as a customer in a pipe shop open to the public. Petit., Apx. pp. 13-15, 23.

There is thus not even present in this case the element of confidentiality which was present in *Branzburg v. Hayes*, and *In the Matter of Paul Pappas*, 408 U.S. 665, 92 S. Ct. 2646 (1972).

The opinion of this Court in the *Branzburg*, *Pappas*, and *United States v. Caldwell* cases, *supra*, 408 U.S. 665, is dispositive of this case. In *Branzburg* this Court posed the issue to be decided as follows:

> "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor other constitutional provision protects the average citizen from dis-

> closing to a grand jury information that he has received in confidence. The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them." ..... U.S. at ....., 92 S. Ct. at 2656.

This Court answered that question as follows by refusing to extend a new constitutional right to newsmen which was not enjoyed by other citizens:

> "Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process." ..... U.S. at ....., 92 S. Ct. at 2660-2661.

In the instant situation there is far less justification for granting Petitioner newsman a constitutional right to decline to testify because, as previously noted, protection of the confidentiality of a newsman's sources is *not* involved since Petitioner was asked to answer questions before the Grand Jury involving only his personal observations as a member of the public, not identified as a newsman. As stated in *Branzburg*:

> "Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents

> no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not." ..... U.S. at ....., 92 S. Ct. at 2662.

In rejecting the argument that the State must, before the Grand Jury can summons a reporter, show that the relevant information is not available from other sources, this Court stated, ... U.S. at ....., 92 S. Ct. at 2666-2667:

> "Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. 'When the grand jury is performing its investigatory function into a general problem area, . . . society's interest is best served by a thorough and extensive investigation.' Wood v. Georgia, 370 U.S. 375, 392 (1962). A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' United States v. Stone, 429 F.2d 138, 140 (C.A. 2, 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. . . . *We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.*" (Emphasis supplied.)

Consistently, since the *Branzburg* opinion, this Court has declined to hear other appeals by newsmen who have re-

fused to testify. See *Farr v. Los Angeles County*, 22 Cal. App. 3d 60 (1971), *cert. denied*, No. 71-1642, 41 L.W. 3274 (11/13/72) (Reporter found guilty of contempt for refusing to disclose identity of persons furnishing him with statements allegedly in violation of court order concerning publicity in Manson murder trial since Freedom of Press Clause does not preclude inquiry into reporter's sources allegedly supplied in violation of that order.) *Cf., Bridge v. New Jersey*, 120 N.J. Super. 460, 295 A.2d 3 (1972), *cert. denied*, 72-923, 41 L.W. 3503 (3/19/73).

The issue raised in this Petition, in light of *Branzburg*, thus ultimately becomes whether Petitioner can avoid his duty, shared with all other citizens, to testify before the Grand Jury on the ground that this single instance of summoning him to testify about his personal observations revealing criminal activity constitutes unconstitutional harassment, merely because Petitioner wrote a newspaper article about what he had seen and heard. To ask the question is to answer it. The question is without constitutional substance. If, as this Court held in *Branzburg*, a reporter may be compelled to testify before a Grand Jury in connection with its investigation of criminal activity, then it cannot constitute unconstitutional harassment of the press to compel him to answer the questions put to him about his personal observations.

The mere acknowledgment by the State's Attorney, under questioning by defense counsel, that he did not always agree with everything that was written in the subject newspaper does not establish unconstitutional harassment.

There is simply no evidence that Petitioner had ever been summoned to testify or even questioned previously by any of the officials involved. In any event, the *Branzburg* opinion makes it clear that the Grand Jury does not have to exhaust

all alternative means of obtaining evidence of criminal activity before it can ask a newsman relevant questions because it has wide latitude in conducting its investigations. ..... U.S. at ....., 92 S. Ct. at 2666-2667, *supra*, p. 8. There is simply no indication of harassment in this meager record.

CONCLUSION

Since no important constitutional question has been raised in light of *Branzburg v. Hayes*, *supra*, and for the other reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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